IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Steve Weinberg,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	**Civil Action No. 3-06-CV2332-B**
	§	**ECF**
National Football League Players Association, Richard Berthelsen, Gene Upshaw,Tom DePaso, Trace Armstrong, Roger Kaplan, John Collins, Keith Washington, Tony Agnone, Howard Shatsky, and Mark Levin,	§ § § § § § §	
	§	
Defendants.	§	

PLAINTIFF'S RESPONSE TO DEFENDANT ROGER KAPLAN'S
MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

Dockets.Justia.

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Pursuant to the Federal Rules of Civil Procedure, Plaintiff Steve Weinberg ("Weinberg") files this Response to Defendant Roger Kaplan's Motion to Dismiss for Lack of Personal Jurisdiction and respectfully shows the Honorable Court the following:

I.

PROCEDURAL BACKGROUND

1. On November 17, 2006, Weinberg filed suit against the National Football League Players Association ("NFLPA"), Gene Upshaw ("Upshaw"), Richard Berthelsen ("Berthelsen"), Tom DePaso ("DePaso"), Trace Armstrong ("Armstrong"), Mark Levin ("Levin"), Roger Kaplan ("Kaplan"), Keith Washington ("Washington"), John Collins ("Collins"), and others in Texas state court: *Weinberg v. National Football League Players Association, et al.*, Cause No. 06-11845, in the 95th Judicial District Court of Dallas County, Texas ("Texas State Court"). On November 20, 2006, Weinberg filed Plaintiff's First Amended Petition, which is the live petition ("Petition").[1]

2. On December 8, 2006, Defendants NFLPA, Upshaw, Berthelsen, DePaso, Armstrong, Washington, Collins, and Levin filed a Notice of Removal (doc. 1) to this Court arguing preemption under Section 301 of the Labor Relations Management Act ("LRMA"), preemption under Section 9 of the National Labor Relations Act ("NLRA"), and diversity under a theory of improper joinder. *See also* Plaintiff's Motion to Remand, filed January 31, 2007 (doc. 20).

[1] *See* Plaintiff's First Amended Petition ("Petition"), (doc. 1-5), which is and incorporated herein by reference.

3. On December 27, 2006, Defendant Kaplan filed a Motion to Dismiss for Lack of Personal Jurisdiction (doc. 6) arguing that the exercise of personal jurisdiction over him in Texas did not comport with federal due process requirements.

4. On February 1, 2007, Weinberg filed this response to Kaplan's motion to dismiss, arguing that specific jurisdiction was proper based on Kaplan's participation in a conspiracy to commit intentional torts against Weinberg in Texas and the many letters, phone calls, and emails back and forth between Kaplan and Weinberg in Texas.

II.

FACTUAL BACKGROUND

5. Weinberg was a sports agent for professional football players in the National Football League ("NFL"). He was licensed by the NFLPA (the players' union) as a "Contract Advisor," duly authorized to negotiate player contracts with NFL teams on behalf of his clients. Weinberg was a tough agent who was never afraid to challenge the system or "ruffle some feathers" if it was in his players' best interest. Unfortunately, Weinberg's zealous advocacy drew the ire of certain executives at the NFLPA's headquarters, including Upshaw, Berthelsen, and DePaso, who resented Weinberg's open criticism of their decision making with respect to several matters, including the 1987 players' strike, the 1993 salary cap, the failure to secure guaranteed contracts, and the unequal treatment of players and agents.[2]

6. In the spring of 1999, Weinberg became involved in a legal dispute with his former partner, Howard Silber ("Silber"), over the division of partnership assets. Silber and

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[2] *See* Petition (doc. 1-5) at Introduction, ¶¶ 16-18, 30-40.

Weinberg wound up arbitrating their dispute in Dallas, Texas, which resulted in an award against Weinberg, which he sought to have vacated. Silber attempted to have the award reduced to a final judgment, and Weinberg opposed him in federal court in Dallas Texas. The arbitration award was amended and then reduced to a final judgment, which was also amended and then Weinberg filed an appeal to the Fifth Circuit.[3]

7. While the appeal was pending, Silber filed garnishment proceedings against Weinberg's clients in state court in Texas and elsewhere seeking to collect payments that were due to Weinberg under the contracts with his NFL clients. This conduct violated the NFLPA's Regulations, and Weinberg and several of his clients filed Section 5 arbitration grievances with the NFLPA against Silber asking for sanctions. In response, Silber filed a counter-grievance against Weinberg also asking for sanctions.[4]

8. Upshaw, Berthelsen, DePaso, and others saw this dispute as an opportunity to make Weinberg's life miserable: their plan was to decertify him so that he could no longer represent NFL players and (presumably) they would no longer have to deal with him. They drug numerous others into their conspiracy, some explicitly and others tacitly, for the purpose of achieving Weinberg's decertification though illegal and fraudulent means.[5]

9. Specifically, Berthelsen and DePaso set a trap for Weinberg by instructing Kaplan not to set the Section 5 grievances involving Weinberg and Silber for hearing. Weinberg spent months futilely trying to get the grievances heard, but Kaplan—acting on orders from his co-conspirators—refused to set any hearing. All the while, Berthelsen and DePaso were planning to

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[3] *See* Petition (doc. 1-5) ¶¶ 19-26.
[4] *See* Petition (doc. 1-5) ¶¶ 27-29.

file a Section 6 disciplinary complaint against Weinberg (as requested by Silber) but intentionally deceived Weinberg into believing that no Section 6 disciplinary action would be taken until the Section 5 grievances had been decided. As a result, Weinberg continued to fight the "botched" amended arbitration award in court rather than simply paying the incorrect amount that Silber claimed he was owed, thereby mooting Silber's garnishment actions.[6]

10. Nonetheless, Berthelsen and DePaso continued to press for disciplinary action to be taken against Weinberg. They held a disciplinary committee meeting where, without hearing evidence or considering arguments from Weinberg, they convinced the disciplinary committee to impose the harshest discipline ever meted out by the committee to a contact advisor. As a result, Weinberg's NFLPA license was immediately revoked for three years—a practical death sentence for Weinberg's career—meaning that he was prohibited from representing NFL clients in contract negotiations for a minimum of three years and would have to reapply for a new license.[7]

11. After the appeal was finally heard, Kaplan reduced the punishment from a three-year revocation to an eighteen-month suspension but the damage had already been done. While on the surface it might seem that Kaplan sided with Weinberg, in fact, he carried out an essential role in the conspiracy by refusing to schedule the Section 5 grievances, thereby keeping

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[5] *See* Petition (doc. 1-5) ¶¶ 38-45.

[6] *See* Petition (doc. 1-5) ¶¶ 46-55; *id.* ¶ 50 ("The conspirators knew that once Kaplan heard Weinberg's appeal, he would uphold (in one way or another) the action taken by the NFLPA Agent Disciplinary Committee. However, under the Regulations, if Kaplan first heard the Section 5 grievances filed by Weinberg and Davis (and Silber) that were already on file and pending before Kaplan, then any appeal of potential disciplinary action against Weinberg (or Silber) was required to go to a new, neutral arbitrator, rather than Kaplan. As a result, the conspirators purposely blocked repeated efforts by Weinberg and Davis to arbitrate their Section 5 grievances against Silber and caused Kaplan not to set the Section 5 grievances for hearing, thereby dragging Kaplan into their conspiracy. Indeed, Kaplan (and the NFLPA) ***never*** allowed Weinberg to move forward with his Section 5 grievances against Silber despite months (even years) of repeated requests from Weinberg to Kaplan (and the NFLPA), asking that Kaplan schedule the Section 5 grievances for hearing.").

Weinberg within the conspirators' crosshairs, ruling against Weinberg in his emergency appeal to stay the immediate revocation, and then *de facto* rubberstamping the conspirators actions by upholding the immediacy of Weinberg's expulsion. As a result, Kaplan prevented Weinberg from participating in a multitude of free agent contract negotiations on behalf of his NFL clients, which would have earned the players millions of dollars and helped to support Weinberg and his family for several years, even if he had later been decertified.[8]

12. Additionally, Weinberg's decertification served as the basis upon which the conspirators began disrupting Weinberg's income from previously negotiated player contracts. Although there was no basis in law for their actions, Upshaw and others began contacting Weinberg's players, including Texas residents, and telling them not to pay Weinberg agent fees that were owed under their existing player contracts.[9]

13. Moreover, the conspirators trumped up new charges against Weinberg and convinced Washington, a former client of Weinberg's and a resident of Texas, to participate in their conspiracy—perhaps unknowingly—by submitting a false and misleading letter that they then used as the basis for an additional disciplinary complaint against Weinberg. Based on Washington's false and misleading letter, Berthelsen and others then had the NFLPA's agent disciplinary committee recommend an additional five year immediate revocation of Weinberg's license (which would take effect either during or after the eighteen-month suspension per Kaplan's ruling on the prior disciplinary complaint).[10]

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[7] *See* Petition (doc. 1-5) ¶¶ 46-62.
[8] *See* Petition (doc. 1-5) ¶¶ 63-65.
[9] *See* Petition (doc. 1-5) ¶¶ 85-89.
[10] *See* Petition (doc. 1-5) ¶¶ 66-75.

14. Once again, Kaplan aided in the attack on Weinberg by acting on the conspirator's express or implicit orders and refused to enforce his own previously signed subpoena directing the conspirators to produce much needed evidence so Weinberg could fully defend the new charges against him. By doing so, Kaplan set in motion a new part of the conspiracy, which was meant to further deny Weinberg his right to an appeal of this additional revocation. As a result, no hearing on the appeal of this additional disciplinary conduct was ever set or conducted and Weinberg has remained unemployed and without an income to support his family during this entire time (since February 2003).[11]

15. During this same time, in an effort to collect the agent fees that were due to him for his prior work, Weinberg attempted to schedule hearings with Kaplan regarding numerous previously filed fee grievances under the NFLPA's arbitration system. Kaplan simply ignored most of these requests and, as recently as July 2006 threatened to dismiss over half of them. Kaplan's actions here, as before, were based on improper ex-parte instructions from Berthelsen and other co-conspirators.[12]

16. As a result of this conspiracy—and Kaplan's involvement in the conspiracy—and the tortious conduct directed at him, Weinberg and his family have suffered grievously. Not only did Weinberg lose all his NFL clients and the job he loved so much, more importantly, Weinberg's family lost its sole means of support.[13]

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[11] *See id.*; *id.* ¶¶ 66-75.
[12] *See* Petition (doc. 1-5) ¶¶ 85-89.
[13] *See* Petition (doc. 1-5) ¶¶ 91-93.

17. Kaplan sent a multitude of letters and other correspondence to Weinberg in Texas in connection with the grievances and disciplinary complaints filed by and against Weinberg and others, many of which were intentionally misleading and/or designed to obviate Weinberg's request to set certain matters for hearing, which should constitute action taken by Kaplan in Texas in furtherance of the conspiracy against Weinberg.[14]

18. Furthermore, Upshaw, Berthelsen, DePaso, Collins, Levin, and Washington all committed overt acts in furtherance of the conspiracy in Texas for which Kaplan is liable by virtue of his participation in the conspiracy. Upshaw and Berthelsen instructed Weinberg's clients in Texas not to pay him money owed under contracts in Texas. Berthelsen and DePaso contacted Washington and convinced or coerced him to send a false and misleading letter, which they used as the basis for immediately revoking Weinberg's license for five years. Berthelsen and DePaso contacted Collins in Texas and convinced him to participate in their conspiracy, which included improperly assisting Silber in his dispute with Weinberg and also testifying falsely and without any proper basis that Weinberg had improperly transferred funds in violation of Texas state law. Berthelsen got Levin to improperly file two separate false and misleading affidavits in court documents in Texas as part of the Weinberg/Silber dispute. All of these actions occurred in Texas and constitute tortious conduct within the forum jurisdiction.[15]

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[14] *See* Declaration of Steve Weinberg ("Weinberg Dec."), Exhibit "A" to the Appendix in Support of Plaintiff's Response in Opposition to Defendant Kaplan's Motion to Dismiss for Lack of Personal Jurisdiction, which is incorporated herein by reference.

[15] *See* Petition (doc. 1-5) ¶¶ 82-90.

III.

ARGUMENT AND AUTHORITIES

A. The Texas Long Arm Statute

19. Personal jurisdiction over a nonresident defendant is proper in Texas if (i) the Texas long arm statute authorizes jurisdiction and (ii) the exercise of jurisdiction comports with federal due process requirements.[16]

20. The Texas long arm statute authorizes the exercise of personal jurisdiction over nonresidents who do business in Texas,[17] and a nonresident is considered to "do business" in Texas "if the nonresident . . . commits a tort in whole or in part in this state."[18]

21. "Because courts have interpreted the Texas long-arm statute to extend to the limits of due process, the sole inquiry for the court is whether the assertion of personal jurisdiction over [the nonresident] comports with federal constitutional requirements."[19]

B. The Federal Due Process Requirements

22. Federal due process requires that (i) the defendant must have established minimum contacts with the forum state and (ii) the exercise of personal jurisdiction must comport with traditional notions of fair play and substantial justice.[20]

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[16] *See TIG Ins. Co. v. Nafco Ins. Co., Ltd.*, 177 F. Supp. 2d 561, 564-65 (N.D. Tex. 2001).

[17] *See* TEX. CIV. PRAC. REM. CODE § 17.041-045; *Schlobohm v. Shapiro*, 784 S.W.2d 355, 357 (Tex. 1990); *Cherokee Labs., Inc. v. Rotary Drilling Servs., Inc.*, 383 F.2d 97 (5th Cir. 1967); *Hearne v. Dow-Badishe Chem. Co.*, 224 F. Supp. 90 (S.D. Tex. 1963).

[18] TEX. CIV. PRAC. REM. CODE § 17.042.

[19] *TIG Ins.*, 177 F. Supp. 2d at 265.

[20] *See International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

Minimum Contacts

23. "Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there," the defendant must have "purposefully directed its activities at the forum state and the litigation results from alleged injuries that arise out of or relate to those activities."[21]

24. The reasoning is that a nonresident defendant who directs tortious conduct at another state should reasonably expect to be haled into court in that state to answer for his conduct.[22] Thus, when a nonresident defendant is alleged to have directed actions toward the forum state with full knowledge that a resulting injury would occur in the forum state, the requirements for specific jurisdiction are met.[23] The quality of the contacts alleged, not the quantity or duration, is what matters in the context of specific jurisdiction.[24]

25. For jurisdictional purposes, a tort is considered to have occurred in Texas if the injury is felt in Texas.[25] For example, in *Calder v. Jones*, the seminal case on "effects jurisdiction," the United States Supreme Court found that a California court had personal jurisdiction over two newspapermen in a libel action based on a defamatory article written in Florida that affected the plaintiff's reputation in California because "their intentional, and allegedly tortious, actions were expressly aimed at California."[26]

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[21] *Burger King v. Rudzewicz*, 471 U.S. 462, 472 (1985); *see TIG Ins.*, 177 F. Supp. 2d at 265 ("Specific jurisdiction exists if the plaintiff can establish that the lawsuit arises out of, or relates to, the nonresident defendant's particular activity or contacts with or within the forum state.").

[22] *See D.J. Invs. v. Metzeler Motorcycle Tire Agent Gregg, Inc.*, 754 F.2d 542, 547 (5th Cir. 1985); *Brown v. Flowers Indus., Inc.*, 688 F.2d 328, 333-34 (5th Cir. 1982).

[23] *See Wien Air Alaska, Inc. v. Brandt*, 195 F.3d 208, 211 (5th Cir. 1999) (citing *Calder v. Jones*, 465 U.S. 783, 789-90 (1984)).

[24] *See Mississippi Interstate Exp. Inc. v. Transpo, Inc.*, 681 F.2d 1003, 1006 (5th Cir. 1982).

[25] *See Union Carbide Corp. v. UGI Corp.*, 731 F.2d 1186, 1189-90 (5th Cir. 1984).

[26] *Calder*, 465 U.S. at 789.

26. "When the actual content of communications with a forum gives rise to intentional tort causes of action, this alone constitutes purposeful availment."[27] "Even a single purposeful contact may be sufficient to meet the requirements of minimum contacts when the cause of action arises from the contact."[28] Although some cases hold that a single phone call or letter is insufficient to satisfy the "minimum contacts" requirement, those are "stream of commerce" cases not based on intentional torts.[29]

27. "When reaching a decision to exercise or decline to exercise jurisdiction based on the defendant's alleged commission of a tort, the trial court should rely only upon the necessary jurisdictional facts and should not reach the merits of the case."[30] "[U]ltimate liability in tort is not a jurisdictional fact, and the merits of the cause are not at issue. Rather, the purpose . . . is to determine whether the actions alleged by a plaintiff suggest that a defendant should expect to be subject to jurisdiction in Texas."[31] Moreover, "the plaintiff need only make out a prima facie case of personal jurisdiction; proof by a preponderance of the evidence is not required."[32]

Fairness

28. "Once it has been determined that the nonresident defendant purposefully established minimum contacts with the forum state, the contacts are evaluated in light of other factors to determine whether the assertion of personal jurisdiction comports with fair play and substantial justice. These factors include (1) the burden on the defendant, (2) the interests of the

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[27] *Wien Air Alaska*, 195 F.3d at 213; *see also Brown*, 688 F.2d at 332-33.
[28] *Micromedia v. Automated Broadcast Controls*, 799 F.2d 230, 234 (5th Cir. 1984).
[29] *See Lewis v. Fresne*, 252 F.3d 352,359 (5th Cir. 2001).
[30] *Tempest Broadcasting Corp. v. Imlay*, 150 S.W.3d 861,871-72 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *Wright v. Sage Eng'g, Inc.*, 137 S.W.3d 238, 251 n. 10 (Tex. App.—Houston [1st Dist.] 2004, pet. denied).
[31] *Glatty v. CMS Viron Corp.*, 177 S.W.3d 438, 446 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

forum state in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several States in furthering fundamental substantive social policies."[33]

29. "These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required."[34] "Only in rare cases . . . will the exercise of jurisdiction not comport with not comport with fair play and substantial justice when the nonresident defendant has purposefully established minimum contacts with the forum state."[35]

30. "When a defendant purposefully avails himself of the benefits and protections of the forum's laws—by engaging in activity outside the state that bears reasonably foreseeable consequences in the state—maintenance of the lawsuit does not offend traditional notions of fair play and substantial justice."[36]

C. Kaplan's Contacts with Texas

31. The Petition alleges that Kaplan conspired with Texas residents and others to commit intentional torts "in whole or in part" in Texas knowing and intending that his actions would result in injuries to Weinberg, a resident of Texas. The underlying claims upon which the conspiracy is based are fraud, tortious interference, and illegal restraint of trade.

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[32] *TIG Ins.*, 177 F. Supp. 2d at 265 (citing *Thompson v. Chrysler Motor Co.*, 775 F.2d 1162, 1165 (5th Cir. 1985)).
[33] *Guardian Royal Exchange Assurance v. English China Clays, P.L.C.*, 815 S.W.2d 223, 228 (Tex. 1991).
[34] *Burger King*, 471 U.S. at 477.
[35] *Guardian Royal*, 815 S.W.2d at 231; *Burger King*, 471 U.S. at 477-78.
[36] *Brown*, 688 F.2d at 333.

32. Under Texas law, a civil conspiracy is a combination of two or more persons to accomplish an unlawful purpose or a lawful purpose by unlawful means.[37] Conspiracy requires the following elements: two or more persons, an objective to be accomplished, a meeting of the minds on the objective, one or more overt acts in furtherance of the objective, and damages as a proximate result.[38]

33. It is not required that the conspirators enter into a formal agreement; a tacit understanding will suffice.[39] Additionally, mere participation in the transaction is sufficient to infer a concerted action; thus, each conspirator need not know all the details of the conspiracy.[40] Furthermore, the members of the conspiracy need not have participated in all the acts in furtherance of the conspiracy; rather, a single act by one co-conspirator can be imputed to all the members of the conspiracy.[41] The law is clear: all co-conspirators are jointly liable for any actions taken in furtherance of the conspiracy, similar to an agency relationship.[42]

34. Based on the law of civil conspiracy, there has arisen a so-called "conspiracy theory" of jurisdiction under which a co-conspirator's contacts with the forum state can be imputed to a nonresident defendant who otherwise would not be subject to personal jurisdiction in the forum state.[43]

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[37] *See Triplex Comms., Inc. v. Riley*, 900 S.W.2d 716, 719 (Tex. 1995).
[38] *See Operation Rescue Nat'l v. Planned Parenthood of Houston & S.W. Tex., Inc.*, 975 S.W.2d 546 (Tex. 1998).
[39] *See J.T.T. and M.T. v. Chlon Tri*, 111 S.W.3d 680, 684 (Tex. App.—Houston [1st Dist.] 2003, pet. granted on other grounds) (citing *Bourland v. State*, 528 S.W.2d 350, 354 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).
[40] *See J.T.T*, 111 S.W.3d at 684 (citing *Bourland*, 528 S.W.2d at 354.
[41] *See Carroll v. Timmers Chevrolet, Inc.*, 592 S.W.2d 922, 925 (Tex. 1980).
[42] *See Akin v. Dahl*, 661 S.W.2d 917, 921 (Tex. 1983).
[43] *See, e.g., Compass Marketing, Inc. v. Schering-Plough Corp.*, 438 F. Supp. 2d 592, 595 (D. Md. 2006) ("[A]ccording to the Complaint, Compass suffered injury as a result of the price-fixing conspiracy. Therefore, it is clear that not only were jurisdictional contacts established during that period, but that those contacts were in furtherance of the conspiracy. That being the case, those contacts are imputable to the individual defendants. *See*

35. Although the Texas Supreme Court rejected this theory on the facts in *National Indus. Sand Ass'n v. Gibson*,[44] the allegations in that case were very different from the ones here. Specifically, in *Gibson*, the plaintiffs were workers who had contracted silicosis and sued several manufacturers and sellers of sand, alleging claims "based on negligence and products liability."[45] The plaintiffs also sued the sand companies' lobbyist and tried to obtain personal jurisdiction under the conspiracy theory of jurisdiction, claiming that they had conspired with the sand manufacturers to "suppress[] information on the dangers of silica" and "defeat[] the 1974 public health movement to ban the use of abrasives containing high levels of silica."[46] Setting aside the issue of whether there can even be a conspiracy to commit negligence or products liability, it is clear that the conspiracy allegations in *Gibson* did not involve an intentional tort directed at the plaintiff in the forum jurisdiction. In this case, Plaintiff Weinberg's claims are based on

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McLaughlin v. Copeland, 435 F. Supp. 513, 530-32 (D. Md. 1977) (attributing an over act to a co-conspirator who otherwise would not have had jurisdictional contacts because "when individuals join in a conspiracy the acts of one conspirator are attributable to each co-conspirator."); *Ghazoul v. International Mgmt. Servs.*, 398 F. Supp. 307, 313 (S.D.N.Y. 1975) ("[B]ecause the allegations of the complaint, if proved, would allow the finder of the facts to conclude: (1) that there existed a conspiracy to defraud creditors of IMS; (2) that Spire was a member thereof; (3) that the locus of the tort was in New York; and, therefore, (4) that Spire participated in and committed a tortious act within this state by virtue of its own conduct, as well as that of its co-conspirator (agent) IMS, we find that a sufficient nexus between Spire and a New York based tort has been established for purposes of this motion."); *Mandelkorn v. Patrick*, 359 F. Supp. 692, 696-97 (D.D.C. 1973) ("While they personally had no direct contacts here, their involvement in an allegedly wide-ranging conspiracy which is said to have caused injury in the District of Columbia is sufficient nexus to this jurisdiction to require them to answer here for their roles in the alleged course of events."); *see also Heatransfer Corp. v. Volkswaverwerk A.G.*, 1974 WL 1010, *6 (S.D. Tex. Dec. 31, 1974) ("Under the general principles of law relative to civil conspiracy, the facts of one conspirator are attributable to every other conspirator as if each conspirator were acting as the other's agent. It is the opinion of this Court that a Texas court would find under [State antitrust laws] that a principal outside of Texas was "doing business" within the state by virtue of the acts of an agent within the state. . . . [I]f the deliberate acts of an agent within the state are considered to be at least in part at the direction of a principal outside the state, it cannot be said that that principal has not purposefully availed itself of the privilege of conducting activities within the state as require by due process considerations.").

[44] 897 S.W.2d 769 (Tex. 1995).

[45] *Gibson*, 897 S.W.2d at 771.

[46] *Id.* at 771-72.

allegations that the conspirators directed intentionally tortious conduct at him, a resident of Texas, intending to cause (and actually causing) him injuries in Texas.

36. While a nonresident defendant should not be haled into court in a foreign jurisdiction based solely on "fortuitous" contacts, the notion of fortuity loses traction in the context of an intentional tort directed at a resident of the forum jurisdiction:

> The defendant is purposefully availing himself of the privilege of causing a consequence in Texas. It is of no use to say that the plaintiff 'fortuitously' resided in Texas. If this argument were valid in a tort context, the defendant could mail a bomb to a person in Texas but claim Texas had no jurisdiction because it was fortuitous that the victim's zip code was in Texas. It may have been fortuitous, but the tortious nature of the directed activity constitutes purposeful availment.[47]

37. The jurisdictional allegations show that the conspirators committed fraud against Weinberg "in whole or in part" in Texas because they made representations to Weinberg in Texas, which he relied upon to his detriment in Texas, and that is sufficient to satisfy the minimum contacts requirements of federal due process.[48] Moreover, Kaplan personally sent numerous communications to Weinberg in Texas, some of which were in furtherance of the

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[47] *Wein Air Alaska*, 195 F.3d at 213; *see Calder*, 465 U.S. at 789-90 ("Petitioners liken themselves to a welder employed in Florida who works on a boiler which subsequently explodes in California. . . . Petitioners' analogy does not wash. Whatever the status of their hypothetical welder, petitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California. Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the National Enquirer has its largest circulation. Under the circumstances, petitioners must "reasonably anticipate being haled into court there" to answer for the truth of the statements made in their article.");

[48] *See Wien Air*, 195 F.3d at 215 ("If a cause of action for fraud committed against a resident of the forum is directly related to the tortious activities that give rise to personal jurisdiction, an exercise of jurisdiction likely comports with the due process clause, given the obvious interests of the plaintiff and the forum state.") (citing *D.J. Invs.*, 754 F.2d at 548)); *see also Lewis v. Fresne*, 252 F.3d 352, 358-59 (5th Cir. 2001) (finding that one phone call and an allegedly fraudulent mailer satisfied "minimum contacts" requirement); *Hoppenfeld v. Crook*, 498 S.W.2d 52, 56 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.) ("[A]lthough appellant's misrepresentations may have been made in New York, nonetheless appellee's reliance thereon occurred in Texas. In our view appellee has thus alleged a tort committed in part in Texas.").

Weinberg in connection with said disputes, and sent numerous communications to Weinberg in Texas, some of which were in furtherance of the conspiracy.[49]

38. Furthermore, the jurisdictional allegations show that the conspirators tortiously interfered with Weinberg's contracts "in whole or in part" in Texas because they improperly instructed Weinberg's clients, including Texas residents, not to make contractual payments owed to Weinberg, and that is also sufficient to satisfy the minimum contacts requirements of federal due process.[50] All of these contacts together suffice to establish minimum contracts with in Texas, and all of the contacts can be properly imputed to Kaplan by virtue of his participation in the conspiracy.

[49] *See* Weinberg Dec. ¶¶ 3-6.

[50] *See Central Freight Lines Inc. v. APA Transp. Corp.*, 322 F.3d 376, 383-84 (5th Cir. 2003) ("Based on CFL's complaint, we find that CFL has pled facts that are sufficient to show that APA committed intentional torts that were purposefully directed at APA's contractual business relationship with another Texas entity. Specifically, CFL has alleged that APA was aware of CFL's contractual relationship with Dell Computers and that APA intentionally attempted to interfere with that relationship by holding Dell freight hostage in New Jersey and by manipulating the price of freight delivery in the northeast. CFL has alleged further that APA's actions actually harmed the relationship between CFL and Dell Computers resulting in damages above the statutory minimum for federal diversity jurisdiction."); *Ryerson v. DeSchamps*, No. Civ. A. G-05-092, 2006 WL 126634, *2 (S.D. Tex. Jan. 13, 2006) ("According to Plaintiff, Defendant intended to interfere with Plaintiff's contract and did so by making false statements in letters and through agents concerning Plaintiff's continuing relationship with the Union. These action are enough to establish minimum contacts with the State."); *Bollinger Indus., L.P. v. May*, No. Civ. A. 4:02-CV-1044, 2003 WL 21281634, *3 (N.D. Tex. May 29, 2003) ("May is accused of purposefully committing acts that interfered with Bollinger's contract with Excell which, if true, amount to an intentional tort. The acts May is alleged to have committed would have been directed at Texas in that he knew, having been a major participant in facilitation the contract between Bollinger and Excell Marketing, that his actions would cause economic harm to Bollinger in Texas. If May actually committed the intentional tort of interfering with this contract, then his actions were directed at Texas and he cannot be surprised when he is haled into court in Texas.").

D. The Fairness of Jurisdiction over Kaplan in Texas

39. There is nothing unfair—that would offend traditional notions of fair play and substantial justice—about requiring Kaplan to come to Texas and answer for his role in the conspiracy that caused Weinberg's injuries.

40. First, there is nothing particularly burdensome about requiring Kaplan to defend these claims in Texas. Indeed, Kaplan admits that he occasionally travels to Texas on business; in fact, Kaplan has traveled to Texas on numerous occasions in the past, even scheduling and attending previous Section 5 grievance hearings regarding Weinberg's clients in Dallas, Texas.[51] Furthermore, there is no reason to believe that he would be required to travel to Texas much in connection with this lawsuit anyway.

41. Second, Texas has a compelling interest in adjudicating alleged violations of Texas state law, especially where those claims relate to injuries felt by a Texas resident in Texas.

42. Third, Weinberg certainly has a compelling interest in obtaining convenient and effective relief in his forum state, especially given the tremendous financial strain placed on his family as a result of the conspirators' actions.

43. Fourth, the interstate judicial system's interest in obtaining the most efficient resolution of controversies and the shared interest of the several states in furthering fundamental substantive social policies are probably not affected by whether this case is determined in Texas or in some other forum.

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[51] *See* Weinberg Dec. ¶¶ 3-6.

44. Accordingly, with respect to the adjudication of the intentional tort claims alleged against Kaplan, the fairness requirements of federal due process are met, and Weinberg should be allowed to bring his claims against Kaplan in Texas.

IV.

CONCLUSION

Wherefore, premises considered, Plaintiff Weinberg respectfully requests that this Honorable Court deny Defendant Kaplan's motion to dismiss for lack of personal jurisdiction and grant all such other relief that the Court deems just and appropriate in equity or at law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On February 1, 2007, I electronically transmitted the foregoing Plaintiff's Motion to Remand and Brief in Support Thereof using the ECF System for filing a Notice of Electronic Filing to those parties registered for ECF in this case. I further certify that the foregoing document was served on all counsel of record by ECF.

/s/ S. Wallace Dunwoody IV________
S. Wallace Dunwoody IV